at 300. Yet, they had been excluded from evidence because of mechanical application of the rules of evidence.

The residual hearsay exceptions are a giant step toward resolving that injustice within the evidence code. *See also* Mil.R.Evid. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."). In any event, nothing in *Chambers* supports the proposition that a defendant, who otherwise is permitted to present his defense, is denied constitutional due process of law because certain evidence—the fundamental trustworthiness of which is wholly unestablished by the defendant—is excluded from the trial. *See United States v. Hinkson*, 632 F.2d 382, 386 (4th Cir. 1980).

II

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY ADMITTING INTO EVIDENCE CERTAIN SCIENTIFIC EVIDENCE NOT ACCEPTED AS CONCLUSIVE IN THE SCIENTIFIC COMMUNITY.

A

Before trial on the merits began, trial counsel advised the military judge that he intended to question Agent McGibbon regarding a "presumptive-positive" luminol test for blood in passenger areas of appellant's car. That test was run in the course of a consent search of the car during the period of appellant's interrogation. Defense counsel pointed out that subsequent tests did not show positive in these areas but showed positive only on carpeting in the car's trunk. Assistant trial counsel re-

sponded that these subsequent tests were "*less sensitive*" than luminol (that is, required more blood to be present in order to show positive) but "*more accurate*" than luminol (that is, would not show positive for some chemical substances similar to blood that would show positive in the luminol test).

The prosecutor explained that he wanted to elicit testimony about the luminol test merely to show the progress of the OSI investigation and to explain, in part, why that investigation had focused on appellant. He went on to suggest limiting instructions as to this purpose. Then, in response to defense objection, he further argued that any possible prejudice to appellant would be overcome by other evidence showing the results of the subsequent tests.

In due course, the military judge overruled appellant's objection. He remarked: "I don't see the information as being particularly prejudicial. It has some probative value, and the individual [Agent McGibbon] . . . [could] explain the limited usage of the test. That information will be of some assistance to the court in deciding the case." *See* Mil.R.Evid. 403. He reminded trial counsel of his offer to provide appropriate limiting instructions.

During trial, Agent McGibbon testified as anticipated. He explained that he had tested certain parts of appellant's car for blood. First, he used phenolphthalein, which tested negative; then he used luminol, which showed a presumptive positive in certain areas. As a result of that presumptive positive, he "asked the local sheriff's department to conduct further testing. . . . He testified that luminol is only a presumptive test" that required "further confirmatory testing." Further, he indicated that the presumptive positive was not necessarily "caused by blood, much less by *human* blood." Answer to Final Brief at 9-10.

After Agent McGibbon had finished, the military judge instructed the members as follows:

> Members, when Mr. McGibbon testified, he talked about luminol testing. Since the luminol testing is essentially a screening test, you may not consider the testimony as to the luminol testing as confirming the results indicated. The evidence as to the luminol testing was presented for the limited purposes of showing the OSI's continuing efforts and why the accused continued to be a suspect and not to confirm the presence of blood in the accused's vehicle. Any questions? Apparently not.

Thereafter, Mr. Gregonis, a forensic serologist in the crime laboratory of the local sheriff's department, testified. He stated that his later testing of appellant's car for blood "was negative except for a weak positive on an area of" the trunk's carpet. Answer at 10.

B

Although evidence about why an investigator focused on a particular target usually will be irrelevant, *see United States v. Poole*, 30 MJ 271, 275-76 (CMA 1990), appellant's trial strategy changed that in this case. Appellant's explanation for his confessions to OSI agents was that the police had brow-beaten him into making them, and Agent McGibbon's testimony offered an explanation about why, in part, the agents continued to pursue appellant as a suspect.

Of course, that probative value might still, in a given case, be substantially outweighed by the danger of unfair prejudice. Mil.R.Evid. 403. Here, though, the military judge assured that would not be the case. Not only did he offer clear and accurate instructions to the members that properly limited their consideration of the luminol test, but he was assured by the prosecutor that later testimony would show that the presumptive-positive luminol test in the passenger compartment was not confirmed in subsequent testing. This combination of limiting instructions and Mr. Gregonis' testimony virtually

assured that appellant would not be unfairly prejudiced by Agent McGibbon's testimony.[3]

III

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY THE ADMISSION OF CERTAIN PHOTOGRAPHS OF THE VICTIM AND THE CRIME SCENE WHICH WERE UNFAIRLY PREJUDICIAL AND CUMULATIVE OF OTHER PROPERLY ADMITTED PHOTOGRAPHS.

During trial, the defense objected to eighteen photographs of the victim and crime scene and a videotape of the crime scene offered by the prosecution. Partially overruling the objection, the military judge admitted ten of the photographs, excluding the remaining photos as well as the videotape. Of the ten, four were of the victim: One was a color photo taken at the murder scene, and the other three were black-and-whites from the autopsy.

---

[3] Notwithstanding the limiting instruction, trial counsel remarked during his closing argument to the members:

> And then he says that it was—in the front it was the other guys who did it, that he was away a little bit but it was the other guy standing over the victim and beating him, that the other guy got soaked with blood. These other guys went out and got in the back of his car without changing their clothes, and *there's no blood found in the back of his car, that is, in the rear passenger section. The only blood found which led them on was in the front.*

(Emphasis added.) Although this comment strayed from the permissible limits of the evidence just discussed, defense counsel did not object to the argument and so waived his appellate complaint. *See* RCM 919(c), Manual, *supra*. In the context of this case and considering all the other evidence, including appellant's confessions, this isolated remark was not plain error that this Court will notice even in the absence of objection. *See United States v. Fisher*, 21 MJ 327 (CMA 1986).

Throughout his appeal, appellant has complained that the four photographs of the victim that were admited unfairly inflamed and shocked the members. *See United States v. White*, 23 MJ 84 (CMA 1986). The Government, in response, acknowledges the nature of the pictures but argues that they necessarily and appropriately reflect the violent nature of the attack on Handy. The Government points out, as it did at trial, that it had elected not to offer more graphic autopsy pictures out of a similar concern as appellant's.

Appellant is correct "that photographs are not admissible for the illegitimate purpose of inflaming or shocking the court-martial." *Id.* at 88. *See* Mil.R.Evid. 403. He must remember, however, that, "[i]f 'the item of proof is admissible for a legitimate purpose, the fact that it also may possibly tend in this undesirable direction is, in and of itself, no ground for reversal.' *United States v. Bartholomew*, 1 USCMA 307, 314, 3 CMR 41, 48 (1952)." 23 MJ at 88.

Our review of the photographs in the context of their use at trial during testimony of prosecution witnesses persuades us that the military judge correctly ruled that the "probative value" of the photographs "far outweigh[ed] the danger of unfair prejudice" to appellant. As we concluded in *United States v. White, supra* at 88:

> [T]he photographs were introduced for a legitimate purpose and aided the factfinding process by making . . . testimony easier to understand. Of course, "[a person who has been brutally murdered by a vicious beating to his head] is not a pretty picture[.]" Here, however, the probative value of the evidence far outweighed any danger of unfair prejudice. Accordingly, we find no abuse of discretion by the military judge in admitting the photographs.

(Citation omitted.)

IV

WHETHER THE COURT OF MILITARY REVIEW ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN HOLDING THAT CHARGE I, MURDER BY STRIKING WITH A BASEBALL BAT, AND CHARGE II, ASSAULT BY STRIKING WITH A BASEBALL BAT, WERE NOT MULTIPLICIOUS FOR SENTENCING.

The military judge appropriately submitted to the members the issue as to how these events had unfolded. He instructed them that, if they found appellant had gone to see the victim with the specific intent to kill him, the two charges would be multiplicious for findings; in that event, they should find appellant not guilty of Charge II, the assault. However, if they believed what appellant had stated in his confessions—that he went to Handy's workplace only to beat a lesson into him and then, after escorting him to the bathroom to help him clean up the blood, had changed his mind and decided to kill him by another, fatal beating—the charges would not be multiplicious.

By their separate findings of guilty to both charges, the members have indicated their factual conclusion of appellant's intent. Now he complains, however, that they should be treated as multiplicious for sentencing.

At the outset, it must be noted that appellant did not raise sentence multiplicity as an issue at trial. Moreover, given the implicit finding of fact discussed above, appellant's crimes were not offenses arising from a single impulse or insistent flow of events with like object or intent of the sort that this Court has sometimes treated as multiplicious for sentencing, *see United States v. Burney*, 21 USCMA 71, 74-75, 44 CMR 125, 128-29 (1971); rather, they were two distinct criminal acts. *Cf.*

United States v. Traeder, 32 MJ 455, 456-57 (CMA 1991). Accordingly, appellant's argument to the contrary is without merit.

DECISION

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, CRAWFORD, and GIERKE concur.

APPENDIX B

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 28760

26 August 1991

UNITED STATES

v.

MASTER SERGEANT DONALD R. BURKS, JR.,
FR438-84-1604
UNITED STATES AIR FORCE

Sentence adjudged 16 April 1990 by GCM convened at George Air Force Base, California. Military Judge: Michael B. McShane.

Approved sentence: Dishonorable discharge, confinement for life, and reduction to E-1.

Appellate Counsel for the Appellant: Mr. William Holmes (argued), Lieutenant Colonel Jeffrey R. Owens, Major Ronald G. Morgan, and Major Ronald A. Gregory.

Appellate Counsel for the United States: Major Morris D. Davis (argued), Colonel William R. Dugan, Jr., Lieutenant Colonel Brenda J. Hollis, and Major Paul H. Blackwell, Jr.

Before

O'HAIR, MURDOCK, and RIVES
Appellate Military Judges

OPINION OF THE COURT

O'HAIR, Senior Judge:

A general court-martial composed of officers found appellant guilty of the unpremeditated murder of Sgt Handy and of assaulting the same Sgt Handy with the intent to inflict grievous bodily harm. Although he had been charged with both assault and premeditated murder (as a capital offense), the appellant's conviction of the assault and the lesser degree of murder resulted in a sentence of a dishonorable discharge, confinement for life and reduction to E-1.

The evidence presented at trial disclosed that Sgt Handy was working alone on a night shift in the civil engineering service call office on the morning of 25 September 1989 when he was savagely murdered. The Office of Special Investigations (OSI) immediately initiated an investigation which included bringing in civilian experts to make a blood spatter analysis and conduct an autopsy on Sgt Handy to determine the cause of death. After conducting Behavioral Analysis Interviews of approximately 150 people, they eventually narrowed the list of possible suspects to about a dozen. The appellant was included in that small group and finally became a suspect after taking a polygraph test. In the post-polygraph interview he denied any misconduct, but continued to submit himself to questioning and gave OSI agents consent to search his house, car, and gym and bowling alley lockers. After two and one-half days of interviews and other interactions with various OSI agents, the appellant

tearfully confessed he had killed Sgt Handy by repeatedly hitting him with an aluminium baseball bat. Appellant first gave an oral confession which was followed by his own typewritten version, and this was later expanded upon in a second typewritten confession. While still with an OSI agent he tearfully repeated his confession to a friend.

Appellant explained that his motivation for the killing was that he was upset with Sgt Handy for allegedly molesting a 13-year-old girl who had a mental age of 9. The appellant was frustrated by the fact that the local civilian jurisdiction had apparently felt there was insufficient evidence to prosecute Sgt Handy and the latter was almost gloating that the civilian charges had been dropped. Therefore, the appellant seems to have decided to impose his own form of justice and he went to Sgt Handy's workplace with the intention of assaulting Sgt Handy and then departing. Appellant further confessed that, following the initial assault to Sgt Handy's head with the baseball bat, he escorted Sgt Handy from the service call area to the men's bathroom to help him clean up the blood. When they arrived at the bathroom area, the appellant then began repeatedly striking Sgt Handy in the area of the head. At the conclusion of this mortal assault the appellant went home, washed his clothes, shoes, and the baseball bat, and began getting his uniform ready for work that day.

Approximately three days after the appellant confessed to killing Sgt Handy he recanted his confession and described a situation in which three men, wearing stars painted on their cheeks and earrings in their right ears, came to his home early in the morning of 25 September. By means of a threat to injure his children, they forced him to drive them to where they could find Sgt Handy. When he let them into the dark civil engineering building, he watched as two of them used a baseball bat and another unique weapon to bludgeon Sgt Handy. Ap-

pellant said he was then ordered to take the killers to their car and as they left him they again threatened him with injury to his children if he reported any of this assault for at least four weeks.

Two months after the recantation of the confession the security police found a letter in a military van used to transport prisoners, including the appellant. The letter was signed by "Michael" and was addressed to the appellant. In that letter Michael wrote that he was the homosexual lover of Sgt Handy and that members of a homosexual cult, not the appellant, had killed Sgt Handy. Michael also said he would be writing letters and preparing a video tape about this killing which he would be sending to various influential persons, and that ultimately he was going to commit suicide. A fingerprint and handwriting analysis of the letter could not determine who authored it and no further information about this missive was discovered.

In one of the best litigated military cases we have read, the counsel on both sides and the military judge were extremely professional and complete in their treatment of all the relevant issues which developed during the trial. The most significant of those issues and the one which received most of the attention during oral argument before us involved the letter from Michael which was discovered in the security police van. This letter gained prominence because, at the onset, the defense disclosed their theory of the case to be that Sgt Handy was killed by a homosexual group and that appellant confessed to the crime only for the purpose of protecting his children from those killers. In addition to appellant's sworn testimony on the merits, the primary defense evidence was to be this anonymous letter from Michael which the defense attempted to introduce in a pretrial session pursuant to a motion for admission of exculpatory evidence. The denial of the defense motion for admission of this letter serves

as the focal point for appellant's prayer for relief before this Court.

The appellant's argument before us, and at trial, is that his due process right to present a defense was denied by the improper exclusion of exculpatory evidence, the letter from Michael. The appellant sought to introduce the letter under the residual hearsay exceptions: Mil.R.Evid 803(24) and 804(b)(5), and also as a statement against interest, Mil.R.Evid 804(b)(3). The military judge denied the defense motion for admission because the letter was hearsay which did "not even come close to the threshold requirements for trustworthiness and reliability." He explained that trustworthiness was a prerequisite for admission under both suggested possibilities and, lastly, under a Mil.R.Evid 403 balancing, he found the letter was not admissible because of the danger of possible confusion that its introduction would cause the court members.

We believe the military judge was correct in his determination. A military judge has considerable discretion to act upon preliminary questions addressing admissibility of hearsay evidence. *United States v. White,* 17 M.J. 953. 956 n.5 (A.F.C.M.R. 1984); Mil.R.Evid 104(a). The burden in that instance is clearly upon the party seeking introduction of this evidence to prove the military judge's exclusion is an abuse of his discretion. *United States v. Mukes,* 18 M.J. 358 (C.M.A. 1984). Similarly, the military judge is inherently given broad authority to exercise his discretion when applying the balancing test found in Mil.R.Evid 403 to proffered evidence; and again the judge's decision will be respected upon appeal unless the appellant can show abuse. *Id.* 18 M.J. at 359.

The appellant suggests the military judge's exclusion of this exculpatory evidence resulted from his arbitrary and unreasonable application of the residual hearsay exception. For support appellant cites *Chambers v. Mississippi,* 410 U.S. 284, (1973) which provides the following:

> [W]here constitutional rights directly affecting the ascertaining of guilt are implicated the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Id., 410 U.S. at 320.

This quote, however, overlooks that Court's remarks earlier in the decision wherein the philosophical background for application of the hearsay rule is provided. This is a theory we adopt as well. The Court explained that the hearsay rule is not a novelty, but rather a rule of evidence which is "based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact." For this reason statements which are made out of court, not under oath, not subject to cross examination, and not made before court members who can assess the demeanor of the witness are traditionally excluded. *Chambers*, 410 U.S. at 298. The exceptions to this hearsay exclusion are those statements which a trial judge believes have an indicia of reliability and therefore should be considered by the court members despite their status as hearsay.

The hearsay statement involved in this case is a letter which is addressed to the appellant, is dated 4 November 1989, and was discovered two weeks later on the floor of the driver's side of a security police van used to transport military prisoners earlier that morning. The author of the letter says his name is Michael, but there is no last name, return address or telephone number which would assist in contacting him. Michael purports to exculpate the appellant by explaining that the victim was killed by members of a homosexual/drug cult and the author and the victim were members of the same cult. The author relates information about the victim and his activities; however, this is primarily information already made public by the appellant and for which there is no other way to verify.

Additionally, the author explained that he had mailed letters containing incriminating materials to local newspapers and Air Force authorities which would supposedly exonerate the appellant. He also indicated his intention to leave a package containing more incriminating materials at a Miami post office. OSI witnesses testified that none of these materials were ever received. The government's handwriting expert eliminated all suspected authors, but catgorized their analysis of appellant's handwriting sample as only "inconclusive".

We examined this letter and, being unaware of any corroborating sources, conclude, as did the military judge, there is a complete absence of any indicia of reliability. Although there is no evidence of who authored it, all fingers point to the appellant. The letter is a completely self-serving document which elaborates on a sequence of events surrounding Sgt Handy's murder which appellant described several days after his confession, but for which there is no corroboration other than from the appellant. Lastly, the timing and location of its discovery suggests one plausible theory which is that the appellant placed the letter in the military van, perhaps under the rear of the driver's seat of the vehicle, and it finally worked its way forward on the day of its discovery. Disregarding the appellant's theorized authorship and delivery of this letter, we find the military judge did not abuse his discretion in not granting the appellant's motion for its admission. Nothing presented by appellant or available to the prosecution provided any semblance of trustworthiness to this document which could serve as a basis for the court members to conclude the document was an authentic, truthful representation of how Sgt Handy was murdered. For these reasons, the appellant was not denied his due process rights when the military judge refused to permit this document to be given to the court members. *United States v. White* and *United States v. Mukes,* both *supra.*

II

In Error II, appellant alleges that government psychological coercion rendered his waivers of Article 31, UCMJ, rights ineffective and thus his confessions involuntary. We remain unconvinced. It is true that from mid-day on 10 October until he confessed on mid-day 12 October, the appellant spent his day time hours with the OSI special agents either being questioned, polygraphed, or just waiting for their next investigative step. All interviews were conducted in a relaxed, pleasant atmosphere. The six agents who were personally involved in this investigation at various stages explained they advised the appellant of his rights before every interrogation session and every request for a search authorization. They also offered him food and refreshments at reasonable intervals and never indicated to him he was not free to leave. This was shown to be true when he requested they terminate a session on the afternoon of the 10th of October because he had to go home to take his children to football practice. In fact, appellant even acknowledged that the agents had advised him of his Article 31 rights 18 times in three days. At none of those times did he exercise his right to remain silent, ask for an attorney, or otherwise indicate his unwillingness to cooperate with them.

The agents described the appellant during these three days as being cooperative and after he confessed he was both thankful and apologetic for lying to the agents. He also confided to them that he would have confessed on the 11th if anyone had interviewed him that day and asked him the question.

This issue was raised at trial and, following his receipt of testimony, the military judge properly concluded the appellant had voluntarily waived his Article 31 rights and his confessions were not the result of coercion. We agree with his decision and the detailed finding of fact in which

he found the prosecution had satisfied its burden of proving that the appellant had voluntarily waived his right to remain silent and to the assistance of an attorney. *United States v. Massengill,* 30 M.J. 800, 805 (A.F.C.M.R. 1990); *United States v. Jenkins,* 24 M.J. 846, 848 (A.F.C.M.R. 1987), *pet. den.* 26 M.J. 70 (C.M.A. 1988); Mil.REvid 304(e)

III

Appellant next asserts that the military judge abused his discretion by admitting four specific photographs of the victim. One of these was a color photo of the victim at the murder scene and the remainder were black and white autopsy photos which showed the extent of the injuries to the victim's face. The defense had objected to 15 of the prosecution photographs and a video tape of the crime scene on the grounds that they were unduly prejudicial because of their graphic nature, and they were cumulative with other photograph already admitted. The military judge reviewed all of the materials and admitted only eight of the 15 photographs, keeping out the remaining seven and the video tape. The judge further limited the prosecution to giving only one set of the photographs to the court members, not a set for each member.

Military judges must properly exercise discretion when asked to rule on the admissibility of potentially inflammatory photographs and should exclude any photographs whose probative value is outweighed by the danger of unfair prejudice. Mil.R.Evid 403; *United States v. Coleman,* 36 C.M.R. 574 (A.B.R. 1965), *pet. denied,* 36 C.M.R. 541 (C.M.A. 1966) In *United States v Mobley,* 28 M.J. 1024 (A.F.C.M.R. 1989) this Court found the military judge erred by admitting autopsy photographs showing the victim's skull In the instant case, the photographs offered and admitted by the military judge were not only screened by him but also played a vital role in

the prosecution's presentation of its case. They were vivid and not pleasant to examine, but under the circumstances it was not an abuse of discretion for the military judge to admit them as evidence.

IV

The next assignment of error we will address concerns multiplicity. The evidence presented at trial described a crime scene in which the victim was attacked first in the service call area and later in the bathroom area where he subsequently died. This is corroborated by appellant's confession, as well as the locations and analysis of the blood spatters. This fact pattern served as the basis for the government's theory of the case and their decision to charge him with both premeditated murder and assault with intent to inflict grievous bodily harm. Appellant urges that these charges are multiplicious for both findings and sentence. The appellant raised only the issue of findings multiplicity at trial and the military judge announced he would let the court members decide the issue. In doing so he instructed the members that if they found appellant had gone to see Sgt Handy with the specific intent to kill him, the two charges would be multiplicious for findings. However, if they believed what he said in his confession (that he went there only to assault him and then leave, but changed his mind after the first assault and reinitiated it by the bathroom), the charges would not be multiplicious. We agree this was the proper approach; the ultimate findings of the court members are supported by facts.

On the issue of multiplicity for sentencing, although this was not raised at trial, we find the events surrounding the assault and later death of Sgt Handy were not committed as a result of a single impulse or insistent flow of events, and therefore were not multiplicious for sentencing. *United States v. Crowe*, 30 M.J. 1144, 1146 (A.F.C.M.R.

1990). *See also United States v. Traeder,* 32 M.J. 455 (C.M.A. 1991).

V

In a final issue, the appellant alleges it was error for the military judge to admit Sgt Handy's airman performance reports, his awards and decorations and a newspaper photograph of the victim in the company of other Humane Society members. The military judge relied on the policy of the Victim and Witness Protection Act and *United States v. Pearson,* 17 M.J. 149 (C.M.A. 1984) for authority to admit this documentary evidence. It was clearly appropriate for the government to be able to show the impact of the loss of Sgt Handy on society, including the Air Force.

The remaining assignments of error have been considered and found to be without merit. The findings of guilty and the sentence are

AFFIRMED.

Senior Judge MURDOCK and Judge RIVES concur.

OFFICIAL

[SEAL]

/s/ Laura L. Green
LAURA L. GREEN
Clerk of Court
Air Force Court of Military Review

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 354507 70033